IN THE

Supreme Court of the United States

OCTOBER TERM 1950

NO. 377

STANDARD OIL COMPANY, A CORPORATION,
Petitioner,

v.

CITY OF TALLAHASSEE, A MUNICIPAL CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner, Standard Oil Company, seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit which affirmed a judgment of the United States District Court for the Northern District of Florida dissolving a temporary restraining order entered by the district court and dismissing the case.

OPINIONS BELOW

The memorandum decision of the district court (R. 124) is reported in 87 Fed. Supp. 145. The opinion of the Court of Appeals (R. 141) is reported in 183 Fed. (2d) 410 (Advance Sheet 183 Fed (2d) No. 4, Sept. 18, 1950.)

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1950 (R. 141), and petition for rehearing was denied on July 28, 1950 (R. 150). The jurisdiction of this Court was invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. May a municipality by its zoning ordinance require the discontinuance of the operation of a gasoline filling station within an area of the city if the enforcement of the ordinance results in a depreciation in the value of the property or causes other financial loss to the owner?

2. May a municipality by a comprehensive zoning ordinance and plan require the discontinuance of the operation of a gasoline filling station within an area of the city where there is heavy vehicular and pedestrian traffic when the ordinance permits continued operation of three other filling stations in other areas, as non-conforming uses, there being no showing of traffic conditions in the other areas?

STATEMENT

The petitioner does not challenge the general authority of the respondent city to regulate the use of property or to require the discontinuance of an existing or non-

conforming use of property in the exercise of the police power through the enactment of a comprehensive zoning ordinance and plan. It contends, however, that the ordinance as applied to its property is unnecessary, unreasonable and discriminatory and in this application would have the Court review the determination of such questions by respondent's legislative body and the finding of specific facts by the district court and the Court of Appeals.

ARGUMENT

1. Certiorari is not granted to review facts.

The decision of the Court below is correct and there is no basis for further review. As this Court has stated: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U. S. 220, 227. Certiorari is not granted "merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty,* 262 U. S. 159, 163.

2. A vested interest cannot be asserted against the police power reasonably exercised.

The authority of a municipality to require the discontinuance of an existing or non-conforming use of property in the exercise of the police power has been specifically recognized and upheld by the Court. *Atlantic Coast Line R. Co. v. Goldsboro,* 232 U. S. 548; *Reinman v. Little Rock,* 237 U. S. 171; *Chicago & A. R. Co. v. Tranbarger,* 238 U. S. 67; *Hadacheck v. Sebastian,* 239 U. S. 394; *Pierce Oil Corp. v. City of Hope,* 248 U. S. 498. In the cases cited the Court has repeatedly upheld and applied the principle that as against the police power there can be no vested right. As

pointed out in *Pierce Oil Corp. v. City of Hope, supra*: "The power is a continuing one, and a business lawful today may in the future, because of the changed situation, the growth of population, or other causes, become a menace to the public health and welfare, and be required to yield to the public good."

3 Depreciation in value of the property or other resulting loss does not render the ordinance invalid.

That the enforcement of the ordinance might result in the depreciation in value of petitioner's property or result in other financial loss to the petitioner does not render the ordinance invalid as applied to the property. The contention of financial loss invariably appears in every case involving the validity of zoning ordinances and especially in attacks upon provisions requiring the discontinuance of non-conforming uses. The Court has consistently rejected such a contention and held that financial loss, no matter how severe, does not of itself give parties a vested right to continue a business, no matter how long it has been conducted, if the business is one whose location may be regulated under the police power. *Reinman v. Little Rock, supra; Hadacheck v. Sebastian, supra; Pierce Oil Corp. v. City of Hope, supra.* The decisions of this Court have been consistently followed by the Supreme Court of Florida. *State v. City of Miami,* 134 So. 541; *Townsend v. Farrey,* 182 So. 448; *State v. City of Miami,* 158 So. 82; *City of Miami Beach v. Ocean & Inland Co.,* 3 So. (2d) 364.

4 The location of gasoline filling stations is special subject of police power through zoning.

The regulation of the location of gasoline filling stations by municipalities is recognized as a special subject for

exercise of the police power through zoning ordinances. In *Pierce Oil Corp. v. City of Hope, supra,* it was held that a state may prohibit the sale of dangerous oils, even when manufactured under a patent from the United States, and it is judicially recognized that the operation of a gasoline filling station constitutes a hazard to the public safety. *Harz v. Paxton,* 97 Fla. 154, 120 So. 3; *State v. Peace,* 139 Fla. 394, 190 So. 607; *Texas Company v. City of Tampa,* (CCA 5), 100 Fed. (2d) 347; *State of Washington v. Fleming* (Wash.), 225 Pac. 647; *Standard Oil Company v. Minneapolis* (Minn.), 204 N. W. 165; *Herring v. Stannus* (Ark.), 275 S. W. 321; *People v. Murdock* (N. Y.), 191 N. E. 871; *Higgs v. Martin* (Tenn.), 51 S. W. (2d) 237; *Fort Worth v. Gulf Refining Co.* (Tex.), 55 S. W. (2d) 795; *Wadhams Oil Co. v. Delavin* (Wis), 243 N. W. 224.

It is also found that the location of a gasoline filling station in close proximity to public buildings is hazardous to public safety and inimicable to the public welfare. Especially is this true in the case of a state capitol building or along streets leading thereto; *State ex rel Oil Service Co. v. Starke* (W. Va.), 122 S. E. 533; *Neef v. City of Springfield* (*Ill.*), 43 N. E. (2d) 947. The location of such stations in the vicinity of public schools is not favored, *Interstate Oil Co. v. Orange* (N. J.), 165 Atl. 99. Ordinances prohibiting the location of gasoline filling stations within business or non-residential districts are upheld, *Pocomoke City v. Standard Oil Co.* (Md.), 159 Atl. 902; *Kramer v. Baltimore* (Md.), 171 Atl. 70; or at any place where by reason of traffic conditions the location of such a station would be dangerous to the public, *Hyma v. Seegar* (Mich.), 207 N. W. 834.

The respondent's City Manager testified that the volume of vehicular traffic at the intersection upon which peti-

tioner's station is located was heavy, that there was also extensive pedestrian travel along the sidewalk on the west side of the station, and that vehicles entering and leaving petitioner's station added to the already congested intersection and impeded both vehicular traffic and pedestrian travel (R. 102-105). This evidence was not contradicted. The Court of Appeals reached the conclusion that in view of the location of the petitioner's station near the State Capitol and the Supreme Court Building, as well as several other state office buildings and a public school, that the discontinuance of the gasoline filling station under the ordinance could not be viewed as arbitrary and unreasonable, "or as having no relation to the safety and general welfare of the community affected." (R. 145-146)

There is no significance in the fact that there has been little or no recent residential development along the street on which petitioner's filling station is located in the absence of any showing in the record that there were any vacant lots upon which additional residences might have been built. Contentions of "natural adaptability" and "the natural trend toward business development" resulted in issues of fact and findings by the district court on such issues adverse to petitioner. The finding of the district court was not only supported by substantial evidence and by the physical conditions within the area, but was confirmed by the Court below. Similar contentions of "natural adaptability"—"highest adaptability" and "the natural trend toward business development" were rejected by this Court in the case of *Euclid v. Ambler Realty Co.*, 272 U. S. 365.

5 There is no confiscation of petitioner's property.

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ordinance permits the use of the property for other business use. The zoning ordinance, Section 27 (petitioner's exhibit 1, introduced in evidence R. 37) provides that with the exception of the use for filling station purposes within the district, any non-conforming use existing at the time of the passage of the ordinance might be continued and "may be continued when changed to another non-conforming use not substantially different in its purpose and method of operation," subject to certain conditions relating to additions to present buildings. Respondent conceded at the pre-trial conference that the property might be used for a business use other than for a gasoline filling station (R. 34). If petitioner, prior to the effective date of the provision requiring the station to discontinue operation, had any doubt as to the construction to be put on Section 27 of the ordinance relating to the use of the premises for other business purposes, it could have obtained assurance of that right by application under the provisions of Section 30 of the ordinance (petitioner's exhibit 1, introduced in evidence R. 37) and the procurement of a certificate of occupancy showing that the proposed use of its property for business purposes was permissible.

6 There is no discrimination or denial of the equal protection of the law.

The fact that there is a small area classified as Business District A one block east of petitioner's property affords no basis for a charge of discrimination, for Section 5 of the zoning ordinance (petitioner's exhibit 1, introduced in evidence R. 37) discloses that gasoline filling stations are not permitted within Business District A. The record clearly shows that there is no discrimination against petitioner's filling station, to the contrary it shows that the removal

requirement was adopted in 1939 as a comprehensive plan of the City for the elimination of all gasoline service stations from the most congested business and residential areas of the City; and that two gasoline filling stations, to-wit, one of petitioner and one of American Oil Company, had, prior to the institution of the suit, been eliminated by ordinance from the congested Business A District located north of the Residence A District within which petitioner's property is located (R. 90). Furthermore, the record shows that two other gasoline filling stations, one of Gulf Refining Company and the other of American Oil Company, were in operation in the same Residence A District in which petitioner's station is located at the time of adoption of the provision of the zoning ordinance requiring discontinuance of such operations and that both of the other stations have ceased operation (R. 46, 112). As pointed out in the opinion of the Court below: "Moreover, the evidence shows that other service stations formerly located in the same district where plaintiff's station is located have ceased operation before the deadline given them under the ordinance, and that plaintiff's station is the only one of five service stations affected by the zoning ordinance which is still in operation." (R. 144)

Furthermore, the fact that three other filling stations are permitted under the terms of the ordinance to continue operation in other areas of the city does not support petitioner's contention that the ordinance as applied to its property denies the equal protection of the law; especially in the absence of any showing in the record of traffic conditions at the locations of the other stations. *Hadacheck v. Sebastian, supra; Texas Co. v. City of Tampa, supra; Hyma v. Seegar, supra; Pocomoke City v. Standard Oil Co., supra; Kramer v. Baltimore, supra; Interstate Oil Co.*

v. Orange, supra; State v. McShane (La.), 106 So. 252; *Harden v. Raleigh* (N. C.), 135 S. E. 151. As pointed out by this Court in *Hadacheck v. Sebastian, supra*: "It may be that brickyards in other localities within the city where the same conditions exist are not regulated or prohibited, but it does not follow that they will not be. That petitioner's business was first in time to be prohibited does not make its prohibition unlawful." In *Harden v. Raleigh, supra*, the Supreme Court of North Carolina pointed out that in one part of a district a filling station may be noxious or offensive to the public within the purview of the ordinance, while in another part it may not be; and that at one place it may menace public safety and at another it may not; the Court holding that an ordinance forbidding the granting of a license for any gasoline filling station at any location where by reason of traffic conditions or fire explosive hazards, a filling station would imperil the public safety was not invalid.

7. The courts will not interfere with municipal discretion in matters of zoning.

It is a well recognized and established principle that the courts will not interfere with municipal discretion in matters of zoning and that there is a presumption of validity surrounding such ordinances. As pointed out by this Court in *Euclid v. Ambler Realty Co., supra*: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control, * * * We have nothing to do with the wisdom or good policy of municipal ordinances." To the same effect are *Hadacheck v. Sebastian, supra; Texas Co. v. City of Tampa, supra;* and the following cases decided by the Supreme Court of Florida: *City of Miami Beach v. Ocean*

& Inland Co., supra; Godson v. Surfside, 8 So. (2d) 497; *State v. Ehringer,* 46 So. (2d) 601.

8. There is no conflict with other decisions.

The petitioner incorrectly contends that the decision of the Court below is in conflict with that of *Nectow v. City of Cambridge,* 277 U. S. 183, and with that of *Euclid v. Ambler Realty Co., supra.* In the Nectow case there was a finding of fact by the special master which was confirmed by the trial court, and it appeared clearly from such facts that the restrictive provisions of the Cambridge ordinance as applied to the property had no relation to public safety or welfare. In the instant case the finding of the trial court, confirmed by the Court of Appeals, supported the conclusion that the ordinance had a direct relation to the general welfare. The decision of the Court of Appeals is not in conflict with the Village of Euclid case for in the instant case both the district court and the Court below inquired into the reasonableness and necessity for the ordinance in its application to the property of petitioner, and the Court below reached the conclusion that under the facts the discontinuance of petitioner's gasoline filling station under the ordinance could not be viewed as arbitrary and unreasonable or as having no relation to the safety and general welfare of the community affected (R. 145-146).

This Court has consistently refused certiorari in similar cases presenting the validity of the provisions of zoning ordinances requiring the discontinuance of non-conforming uses. *State v. McDonald* (La.), 121 So. 613, cert. den. 280 U. S. 556; *Marblehead Land Co. v. City of Los Angeles* (CCA 9), 47 Fed. (2d) 528, cert. den. 284 U. S. 634.

CONCLUSION

The decision of the Court below is correct; there is no conflict of decisions and no basis for further review. The petition for writ of ceriorari should be denied.

Respectfully submitted,

JAMES MESSER, JR.
Counsel for Respondent.

November 1950.